

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION )  
FOR PERMIT NO. 74-16187 IN THE NAME )  
OF KURT W. BIRD AND JANET E. BIRD )**

**ORDER GRANTING JOINT  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT, IN PART**

On October 12, 2018, Kurt W. Bird and Janet E. Bird (“Bird”) filed Application for Permit No. 74-16187 with the Idaho Department of Water Resources (“Department”). The application was protested by Idaho Conservation League, Idaho Department of Fish & Game (“IDFG”), Beyeler Ranches LLC, High Bar Ditch Association, Carl Ellsworth, Purcell Ranch Partnership, Kerry Purcell, Penny Jane Ogden-Edwards, Lemhi Irrigation District, Lemhi Soil & Water Conservation District and Idaho Water Resource Board (“IWRB”).

Bird is represented by attorney Robert Harris. IDFG and IWRB (the “Agencies”) are represented attorney Michael Orr from the Idaho Office of the Attorney General. Beyeler Ranches LLC, High Bar Ditch Association, Carl Ellsworth, Lemhi Irrigation District and Lemhi Soil & Water Conservation District are represented by attorney Travis Thompson.

The Department conducted a pre-hearing conference on April 16, 2019. The parties requested that an administrative hearing be held to decide the contested case. On April 23, 2019, the Department issued a *Notice of Hearing and Scheduling Order*, setting the case for a hearing to be held on August 28 and 29, 2019 in Salmon.

On July 30, 2019, the Agencies filed a *Joint Motion by IWRB and IDFG for Partial Summary Judgment* (“Motion”). On August 13, 2019, Bird filed *Applicant’s Response to Joint Motion by IWRB and IDFG for Partial Summary Judgment* (“Response”). The parties participated in oral arguments on the *Motion* on August 20, 2019.

The *Motion* asks the hearing officer to adopt four conclusions of law (“Proposed Conclusions”) that are derived from a previous contested case: Application for Permit 74-15613 in the name of James and Paula Whittaker (“Whittaker Application” or “Whittaker Case”). Like the pending contested application, the Whittaker Application proposed diverting water from Big Timber Creek for irrigation use. The Whittaker Application was protested by IDFG, among others, and resulted in an administrative hearing before the Department.

On May 10, 2011, the Department issued a *Final Order* approving the Whittaker Application and imposing certain conditions on the resulting permit. The *Final Order* included eleven enumerated conclusions of law, some related to the local public interest review criterion set forth in Idaho Code § 42-203A(5)(e). *See also* Idaho Code § 42-202B (defining “local public interest” as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource”). The Agencies drafted the following four proposed conclusions of law, based on the conclusions from the Whittaker Case:

Proposed Conclusion 1: That it is in the “local public interest.” Idaho Code § 42-203A(5), to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage;

Proposed Conclusion 2: That efforts by local people, organization, and governmental agencies to “reconnect” Big Timber Creek to the Lemhi River, and other local efforts to recover fish species listed under the Endangered Species Act (“ESA”), contribute to the development of a cooperative conservation agreement intended to promote conservation of the listed species and to provide local people with protection from incidental “take” liability under the ESA;

Proposed Conclusion 3: That it is not in the “local public interest,” Idaho Code § 42-203A(5), to approve a new appropriation that will result in further dewatering of Big Timber Creek to the Lemhi River;

Proposed Conclusion 4: The principle of conservation of the water resources within the State of Idaho, Idaho Code § 42-203A(5), requires that portions of the unappropriated water in streams supporting anadromous fish should remain in the streams for the protection of fish habitat and the public interest.

*Motion* at 9 (headings added and citations omitted).

### STANDARD OF REVIEW

The Department’s Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize the filing of motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.260 and 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), the Department relies on standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated caselaw as a guide for addressing motions for summary judgment. A motion for summary judgment may be granted if a hearing officer determines there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* I.R.C.P. 56.

### FINDINGS OF FACT

The *Motion* identifies a number of facts from the Whittaker Case. The Agencies assert that these facts continue to be accurate. These facts formed the basis for the conclusions of law in the *Final Order*. The *Motion* sets forth the following facts from the Whittaker Case:

1. During the irrigation season, diversion of water under claimed water rights often dewateres Big Timber Creek in the lower portions of the stream.
  2. Spring chinook salmon, steelhead, and bull trout inhabit the Lemhi River and some of its tributaries. Spring chinook salmon, steelhead, and bull trout are all listed as threatened species under the Endangered Species Act. The Upper Salmon River Watershed Program
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(formerly the Lemhi River Model Watershed), the local Soil Conservation District, various other local groups, and various state and federal entities have been working in the Lemhi River Basin attempting to restore habitat for spring chinook, steelhead, and bull trout. Some of these efforts include construction and placement of screens in diversion canals to prevent juvenile fish from being flushed into fields with irrigation water, diversion consolidations, construction of headgates, and innovative water transactions and system reconfigurations to restore flows in streams that were previously dewatered. Restoring flows in tributary creeks presently disconnected from the Lemhi River as a result of irrigation during the summer months is a high priority. Reconnection of tributaries to the Lemhi River will open significant additional habitat for salmon, steelhead, and bull trout spawning.

3. Reconnection of Big Timber Creek with the Lemhi River is one of the top five projects in ranking of importance within the Lemhi River Basin.
4. Local landowners, local officials, local irrigation entities, model watersheds, and local governing bodies have cooperatively participated in acquiring water to reconnect tributaries of the Lemhi River to the main stem of the Lemhi River and have promoted other projects to restore and protect anadromous fish.
5. The reconnections, screening, improved diversion structures, and riparian habitat improvement, are components of a conservation plan, supported by the local people and agencies responsible for overseeing recovery, to protect the local people from liability should there be an incidental taking of an endangered species. If a conservation plan is approved by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, local water users are protected from liability should a spring chinook salmon, steelhead, or bull trout be killed, injured, or otherwise “taken” as a result of diversion and use of water for irrigation.

*Motion* at 4 (numbering added and citations omitted).

For purposes of this order, the hearing officer finds that Facts 2-6 listed above, taken from the Whittaker Case, are undisputed. Bird did not argue in its *Response* or during oral argument that Facts 2-6 are in dispute.

Fact 1, on the other hand, is in dispute and may not be accurate. During the oral arguments, it became clear that the parties differ in their understanding of the term “dewatered.” The *Final Order* from the Whittaker Case uses the term “dewatered” to describe times when there is no water remaining in a creek. *Final Order* at 4-6, ¶¶ 9, 10, 12, 17 and 19 (confirming that diversions under existing water rights on Big Timber Creek generally exceed the available flow, explaining that the lower section of Big Timber Creek becomes dewatered during the irrigation season, and describing efforts to restore flows in the dewatered section). The Agencies propose a broader definition of the term “dewatered” which would include any diminishment in flow that reduces or eliminates the habitat functionality of a stream.

If the term “dewatered” is defined as it was used in the *Final Order*, Fact 1 appears to no longer be accurate. Prior to 2010, the lower section of Big Timber Creek was dried up entirely during the summer months. Proposed Exhibit 13, Attachment C. In recent years, however, the lower

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section of Big Timber Creek has had flowing water throughout the entire irrigation season. *Id.* Therefore, Fact 1 does not constitute an accurate, undisputed fact.

## ANALYSIS

### Proposed Conclusion 2

Proposed Conclusion 2 was derived from a conclusion listed in the *Final Order* from the Whittaker Case. *Final Order* at 8, ¶ 6. As drafted, the proposed conclusion is more appropriately characterized as a finding of fact. It appears the hearing officer in the Whittaker Case was simply restating some of the relevant facts of the case to give context to the conclusions of law. The hearing officer in the pending case is not able to establish facts in this case through an order on partial summary judgment. It is possible, however, to restate Proposed Conclusion 2 as a conclusion of law under the local public interest criterion:

It is in the local public interest to reconnect Big Timber Creek to the Lemhi River and to recover fish species listed under the Endangered Species Act (ESA), because those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.

### Proposed Conclusion 3

The Agencies failed to demonstrate that the facts forming the basis for Proposed Conclusion 3 are undisputed. The parties clearly differ in their understanding of the term “dewatered.” There is a genuine dispute of fact as to whether the dewatering of Big Timber Creek, as that term is understood by the Agencies, is in the local public interest. Therefore, partial summary judgment on this issue is not appropriate.

### Proposed Conclusion 4

The proposed conclusion includes a reference to “conservation of water resources.” Subsection (f) of Section 42-203A(5) gives the Department the authority to reject an application that is contrary to conservation of water resources in the state of Idaho. The conclusion of law from the *Final Order* in the Whittaker Case, forming the basis of Proposed Conclusion 4, included the same reference to conservation of water resources. It is not clear that maintaining stream flow for anadromous fish habitat falls within the conservation of water resources review criterion. The Agencies did not provide a persuasive argument as to why the conclusion of law should refer to the conservation of water resources criterion. Therefore, the reference to conservation of water resources should be removed. The revised conclusion would read:

It is in the local public interest to maintain a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat.

## Proposed Conclusions 1, 2 and 4

In their *Response*, Bird states that they have “no intention of challenging the fish-based local public interest basis” for the permit conditions adopted in the Whittaker Case “because there is a well-established history of the ‘local public interest’ including fish and wildlife considerations. *Response* at 3. During oral arguments, Bird confirmed that they are not opposed to Proposed Conclusions 1, 2 or 4 as long as Bird is not precluded from offering evidence on other local public interest factors and the hearing officer is allowed to weigh all of the local public interest factors in the ultimate determination of the pending contested case. The proposed conclusions do not refer to other local public interest factors and do not attempt to compare the factors addressed against other local public interest factors. At hearing, Bird, and all of the parties, will have the opportunity to provide evidence about other local public interest factors. The hearing officer will then be able to weigh Proposed Conclusions 1, 2 (as revised) and 4 (as revised) against other local public interest factors. Therefore, the Agencies’ *Motion* should be granted for Proposed Conclusions 1, 2 (as revised) and 4 (as revised). Proposed Conclusion 3 is based on disputed facts and should not be included in an order granting partial summary judgment.

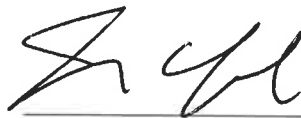
### ORDER

IT IS HEREBY ORDERED that the *Motion* filed by the Agencies is GRANTED, IN PART. The hearing officer concludes, as a matter of law, in the pending contested case that:

1. It is in the local public interest, to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage.
2. It is in the local public interest to reconnect Big Timber Creek to the Lemhi River and to recover fish species listed under the Endangered Species Act (ESA), because those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.
3. It is in the local public interest to maintain a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat.

This is an Interlocutory Order issued pursuant to Rule 710 (IDAPA 37.01.01).

Dated this 21<sup>st</sup> day of August 2019.



James Cefalo  
Water Resource Program Manager

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of August, 2019, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Granting Joint Motion for Partial Summary Judgment, in Part  
(Application for Permit No. 74-16187)

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